

CHANGE REQUEST COVER SHEET

Change Request Number: 11-14

Date Received: 11/17/2010

Title: Buy American Act Exemption - Construction

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Policy OR Guidance: Guidance

Section/Text Location Affected: T3.6.4A.2

Summary of Change: Changes to AMS Guidance and AMS Clauses 3.6.4-3 and 3.6.4- 4 to reflect Buy American Act exemption

Reason for Change: Update to AMS reflecting exemption to Buy American Act for acquisition of information technology that is a commercial item under construction contracts per Consolidated Appropriations Act of 2010

Development, Review, and/or Concurrence: Acquisition Policy Division; Legal; and Contracting organizations at FAA HQ, Centers, and Regions

Target Audience: Contracting workforce and program offices

Potential Links within FAST for the Change: See below

Briefing Planned: No

ASAG Responsibilities: None

Potential Links within FAST for the Change: See below

Links for New/Modified Forms (or) Documents (LINK 1) [Clause 3.6.4-3 Revision](https://conwrite.faa.gov/cwclauselist.cfm?Show=Num, Title, Test, Pers & CatNum = 3.6.2)
<https://conwrite.faa.gov/cwclauselist.cfm?Show=Num, Title, Test, Pers & CatNum = 3.6.2>

Links for New/Modified Forms (or) Documents (LINK 2) [Clause 3.6.4-4 Revision](https://conwrite.faa.gov/cwclauselist.cfm?Show=Num, Title, Test, Pers & CatNum = 3.6.2)
<https://conwrite.faa.gov/cwclauselist.cfm?Show=Num, Title, Test, Pers & CatNum = 3.6.2>

Links for New/Modified Forms (or) Documents (LINK 3) [null](#)

SECTIONS EDITED:

Procurement Guidance:

T3.6.4 Foreign Acquisition

Foreign Acquisition

Section 2 : Buy American Act - Construction Materials [\[Old Content\]](#)[\[New Content\]](#)

[\[RedLine Content\]](#)

SECTIONS EDITED:

Section 2 : Buy American Act--Construction Materials

Old Content: Procurement Guidance:

T3.6.4 Foreign Acquisition

Foreign Acquisition

Section 2 : Buy American Act--Construction Materials

a. The Buy American Act requires that only domestic materials may be used in construction, alteration, or repair in the United States.

b. *Exceptions.*

(1) Buy American does not apply to a construction material purchase of \$3000 or less.

(2) The Administrator is the only person who may waive application of the Buy American Act to a construction material when Buy American Act requirements are not in the public interest.

(3) The Buy American Act restrictions do not apply when the CO determines that:

(a) It is unreasonable in terms of cost; i.e., the cost of domestic construction material exceeds the cost of foreign construction material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate (see Executive Order 10582);

(b) It is impracticable to use a particular domestic construction material; or

(c) The construction material is not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities, of a satisfactory quality.

(4) For construction contracts with an estimated acquisition value of \$8,422,165, Canadian and Mexican construction materials may be treated as domestic for purposes of Buy American Act restrictions, pursuant to the NAFTA Implementation Act.

c. *Documentation.* The CO should briefly document the file as to the basis for exception taken.

d. *Excepted Material.* The CO should list excepted materials in the contract. Documentation justifying the exception will be available for public inspection.

e. Offerors may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer, if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

f. *Noncompliance*

(1) The CO is responsible for conducting Buy American Act investigations when available information indicates such action is warranted.

(2) Unless fraud is suspected, the CO must notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action.

(3) If an investigation reveals that a contractor or subcontractor has used foreign construction material without authorization, the CO must take appropriate action, including one or more of the following:

(a) Process a determination with regard to inapplicability of the Buy American Act

(b) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(c) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the CO may determine in writing that the foreign construction material need not be removed and replaced. Such a determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act applies, and this should be so stated in the determination. Further, such a determination to retain foreign construction material does not affect the Government's right to suspend and/or debar a contractor, subcontractor, or supplier for violation of the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(d) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report for suspension and/or debarment, including findings and supporting evidence. If the noncompliance appears to be fraudulent, consider referring the matter to other appropriate agency officials, such as the officer responsible for criminal investigation and prosecution.

New Content: Procurement Guidance:

T3.6.4 Foreign Acquisition

Foreign Acquisition

Section 2 : Buy American Act - Construction Materials

a. The Buy American Act requires that only domestic materials may be used in construction, alteration, or repair in the United States.

b. *Exceptions.*

(1) The Buy American Act does not apply to a construction material purchase of \$3,000 or less.

(2) The Administrator, in written determination, is the only person who may waive applying the Buy American Act to a construction material when not in the public interest.

(3) The Buy American Act restrictions do not apply when the CO determines that:

(a) It is unreasonable in terms of cost (when the cost of domestic construction material exceeds the cost of foreign construction material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate (see Executive Order 10582));

(b) It is impracticable to use a particular domestic construction material; or

(c) The construction material is not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities, of a satisfactory quality.

(4) For construction contracts with an estimated acquisition value of \$9,110,318 or more, Canadian and Mexican construction materials may be treated as domestic for purposes of Buy American Act restrictions, pursuant to the NAFTA Implementation Act.

(5) The Buy American Act restrictions do not apply to the purchase of information technology that is a commercial item.

c. *Documentation for Exception.* The CO should document the basis for an exception taken.

d. *Excepted Material.* The CO should list excepted materials in the contract. Documentation justifying the exception will be made available for public inspection.

e. *Alternate Offers.* Offerors may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer, if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

f. *Noncompliance.*

- (1) The CO is responsible for Buy American Act investigations when available information indicates such action is warranted.
- (2) Unless fraud is suspected, the CO must notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action.
- (3) If an investigation reveals that a contractor or subcontractor used foreign construction material without authorization, the CO must take appropriate action, including one or more of the following:
 - (a) Process a determination with regard to inapplicability of the Buy American Act.
 - (b) Consider requiring the removal and replacement of the unauthorized foreign construction material.
 - (c) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the CO may determine in writing that the foreign construction material need not be removed and replaced. Such a determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act applies, and this should be so stated in the determination. Further, such a determination to retain foreign construction material does not affect the Government's right to suspend and/or debar a contractor, subcontractor, or supplier for violation of the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.
 - (d) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report for suspension and/or debarment, including findings and supporting evidence. If the noncompliance appears to be fraudulent, consider referring the matter to other appropriate agency officials, such as the officer responsible for criminal investigation and prosecution.

Red Line Content: Procurement Guidance:

T3.6.4 Foreign Acquisition

Foreign Acquisition

Section 2 : Buy American Act- - Construction Materials

- a. The Buy American Act requires that only domestic materials may be used in construction, alteration, or repair in the United States.

b. *Exceptions.*

- (1) *The* Buy American *Act* does not apply to a construction material purchase of \$~~3000~~3,000 or less.
- (2) The Administrator, *in written determination*, is the only person who may waive ~~application of~~*applying* the Buy American Act to a construction material when ~~Buy American Act requirements are~~ not in the public interest.
- (3) The Buy American Act restrictions do not apply when the CO determines that:
 - (a) It is unreasonable in terms of cost; ~~i.e.,~~ *(when* the cost of domestic construction material exceeds the cost of foreign construction material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate (see Executive Order 10582));
 - (b) It is impracticable to use a particular domestic construction material; or
 - (c) The construction material is not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities, of a satisfactory quality.
- (4) For construction contracts with an estimated acquisition value of \$~~82,422,110,165~~318 *or more*, Canadian and Mexican construction materials may be treated as domestic for purposes of Buy American Act restrictions, pursuant to the NAFTA Implementation Act.

(5) The Buy American Act restrictions do not apply to the purchase of information technology that is a commercial item.

c. *Documentation for Exception.* The CO should ~~briefly~~ document ~~the file as to~~ the basis for ~~exception~~ an exception taken.

d. *Excepted Material.* The CO should list excepted materials in the contract. Documentation justifying ~~the~~ exception will be made available for public inspection.

e. *Alternate Offers.* Offerors may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer, if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

f. *Noncompliance.*

- (1) The CO is responsible for ~~conducting~~ Buy American Act investigations when available information indicates such action is warranted.

(2) Unless fraud is suspected, the CO must notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action.

(3) If an investigation reveals that a contractor or subcontractor ~~has~~ used foreign construction material without authorization, the CO must take appropriate action, including one or more of the following:

(a) Process a determination with regard to inapplicability of the Buy American Act.

(b) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(c) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the CO may determine in writing that the foreign construction material need not be removed and replaced. Such a determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act applies, and this should be so stated in the determination. Further, such a determination to retain foreign construction material does not affect the Government's right to suspend and/or debar a contractor, subcontractor, or supplier for violation of the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(d) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report for suspension and/or debarment, including findings and supporting evidence. If the noncompliance appears to be fraudulent, consider referring the matter to other appropriate agency officials, such as the officer responsible for criminal investigation and prosecution.
